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No. 03-666

Supreme Court, U.S
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# In The Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,

*Petitioner,*

vs.

ZONING HEARING BOARD OF EASTTOWN TOWNSHIP,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Do the facts or the law of the case below implicate a so-called "one provider rule" interpreting Section 704(a) of the Telecommunication Act, 47 U.S.C. § 332(c)(7)(B)(i)(II)?

Suggested Answer: No.

Do the facts or law of the case below implicate a clear conflict with the decisions of another United States Court of Appeals?

Suggested Answer: No.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## REASONS TO DENY THE PETITION

The question presented by the Petitioner before this Honorable Court is whether a so-called "one provider rule" is a proper test in implementing the Telecommunications Act of 1996 ("TCA"), particularly as to the TCA's mandate that state and local zoning decisions may not "prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). However, an examination of both the Third Circuit Court of Appeals decision in this case, as well as the facts below, indicate that no such "one provider rule" is at issue.

The Petitioner's "one provider rule" theory is the gravamen of its Petition, and as this argument has no foundation in the law or facts of the case, the Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

## I.

## THE QUESTION PRESENTED BY THE PETITIONER DOES NOT RELATE TO THE LAW OR FACTS OF THE CASE

The case below has taken a lengthy path through both trial and appellate proceedings, but the current Petition springs from a two-day trial before United States Magistrate Judge Jacob Hart. Pet., App. C at 53a-73a. In light of the Petitioner's attempt to place a one hundred ten (110) foot telecommunications tower in a residentially zoned area within Easttown Township, and the Easttown Township Zoning Hearing Board's denial thereof, Judge Hart had been called upon to hear facts concerning, *inter alia*,

the Petitioner's argument that Easttown had improperly prohibited wireless services. He found in favor of Easttown.

The determination by Magistrate Judge Hart involved the "anti-prohibition" prong of the TCA at 47 U.S.C. § 332(c)(7)(B)(i)(II) which provides:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government or instrumentality thereof –
>
> . . .
>
> (II) Shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Magistrate Hart carefully analyzed the Petitioner's technical evidence concerning its claim that a significant gap in service existed along Route 252, a local road which runs through the residential district.[1] The Petitioner's own evidence showed that eight (8) service providers, including the Petitioner, provided wireless service in the area. Judge Hart found that the seven (7) service providers, other than

[1] The Petitioner's characterization of Route 252 as "a major commuter highway," Pet. at 4, does not find support in the record. The Petitioner's own technical witness, Engineer Paul Dugan, challenged his own attorney's characterization of Route 252 "as being a major road." 3d Cir. App. at 174 (3d Cir. App. referring to the Petitioner's appendix filed with the Third Circuit Court of Appeals). Mr. Dugan stated only that "I believe 252 is major relative to its surrounding area in southern Easttown Township." *Id.* This local road was described by Easttown Township's Manager as flanked or surrounded by "very countrified," or "residential" areas. 3d Cir. App. at 371.

the Petitioner (Omnipoint), had a combined service level which matched all of the Petitioner's own testified-to standards for determining adequate service levels in an area. Magistrate Judge Hart summarized the analysis of the Petitioner's engineer, Paul Dugan, as follows:

> Mr. Dugan testified that each phone made approximately eighty phone calls during his test drive for a total of 640 calls total. (N.T. 1/31/02, 89). He then drew our attention to the number of dropped calls, and instances where there was no service. (FN 5)
>
> Reviewing the charts for the seven service providers, other than Omnipoint, we see only 10 dropped calls and one instance of no service. (Plaintiff's Exhibit 2, A E). Therefore, of the 560 calls made utilizing the other providers' services, only 11 or 1.96% experienced service problems. Omnipoint, on the other hand, had 11 dropped calls and 13 instances of no service. (Plaintiff's Exhibit 2, F). Using Mr. Dugan's figure of 80 calls attempted, Omnipoint had service related problems 30% of the time.
>
> > FN 5. Mr. Dugan explained that "fast busy" and "reorder" are functions of capacity, in essence, too many people using their phones at the same time. (N.T. 1/31/02, 101-02). "Connect time out" occurs for any number of reasons when the cellphone cannot connect to the national network properly. (N.T. 1/31/02, 101).
>
> As a result, rather than establishing a significant gap overall, Mr. Dugan's analysis provided that only one provider, Omnipoint, was incapable of providing reliable services to its customers. Such

> a showing does not satisfy the *Penn Township* burden. "[I]t is necessary for the provider to show more than that it was denied an opportunity to fill a gap in its service system." *Penn Township*, 196 F.3d at 480. Having failed to establish a significant gap, Omnipoint has failed to prove the ZHB's denial of the variance had the effect of prohibiting the provision of wireless service.

Pet. App. C at 60a-61a.

The above passage from Magistrate Judge Hart's decision references the Third Circuit case of *APT Pittsburgh, Ltd. v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999), which held that the proper test as to prohibition under the TCA is whether (1) there is a significant service gap as to all providers, not just the applicant, and (2) whether the least intrusive means is proposed to fill such a gap.

As the Petitioner's own technical expert convincingly established the fact that seven (7) other service providers were able to provide reliable service in the area, thus destroying Petitioner's allegation of a significant service gap, Judge Hart found for Easttown, and the tower was not constructed. Now, the Petitioner has re-framed its legal argument to minimize these facts, and thus the so-called "one provider rule" argument was born.

On appeal to the Third Circuit Court of Appeals, the Petitioner argued that *APT Pittsburgh, Ltd. v. Penn Township*, *supra*, established a test in which a municipality could prohibit all other wireless service providers once one provider was in. In the Third Circuit's initial decision on appeal from the decision of Magistrate Judge Hart, Circuit Judge Rosenn reversed in a 2 to 1 ruling, apparently

concerned that the *Penn Township* case "would seem to prohibit any provider from serving an area already served by another provider." Pet., App. B at 41a. However, upon Easttown's Petition for Rehearing, Circuit Judges Sloviter and McKee recognized properly that the facts of the case had nothing to do with Judge Rosenn's speculative concern, and vacated the early decision.

As Judge Sloviter noted in referring to the *Penn Township* case, as well as *Nextel West Corporation v. Unity Township*, 282 F.3d 257 (3rd Cir. 2002), "We do not read those decisions to authorize the township zoning boards to deny any application once the area is already served by another provider, which is Omnipoint's restatement of the holding. Instead, we merely hold that a fact finder determining the existence of a significant gap should examine whether other providers already serve the area. The fact that one applicant may have coverage problems is not determinative of whether there is a significant gap." Pet., App. A at 22a.

A straightforward comparison of the Petitioner's argument before this Honorable Court, and the words of Circuit Judge Sloviter, show beyond cavil that the Petitioner's "one provider" argument has no relation to the Third Circuit ruling. Compare the Petitioner's claim at page 10 of its Petition:

> The Third Circuit has adopted a "one provider rule" whereby a local or state government decision denying a permit for a wireless facility can never have the effect of prohibiting the provision of personal wireless services if at least one competing provider offers wireless service in the relative geographical area.

with the following plain language of Judge Sloviter's opinion:

> Omnipoint argues that a holding will promote monopolization and conflict with the pro-competitive objectives of the TCA (adopting Judge Rosenn's view expressed in the original panel opinion). **But nothing we say here suggests that the zoning board can deny all applications after the first.**

Pet. at 10, Pet., App. A at 21a (emphasis added).

In short, Petitioner has willfully ignored the Third Circuit's majority opinion in an attempt to fashion a certiorari-friendly rule that simply does not exist. Petitioner's argument over the "one provider" theory cannot stand up to Circuit Judge Sloviter's recognition that "[t]he area at issue in this case is already served by seven other providers." *Id.* at 22a.

## II.

## THE DECISION OF THE THIRD CIRCUIT BELOW FALLS SQUARELY WITHIN THE INTENT OF THE TELECOMMUNICATIONS ACT

While the Petitioner cites legislative history of the TCA for the broad proposition that the Act was intended solely to remove barriers to entry by telecommunications providers, *see, e.g.,* Pet. at 21 and 22, these broad assertions give way in the United States House of Representatives Conference Report No. 104-458 to specific language that shows an intent to preserve traditional local governmental zoning and land use powers. For instance, the House Conference report on the Act states:

> [T]he conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

H.R. Conf. Rep. 104-458 at 208, reprinted in 1996 U.S.C.C.A.N. at Vol. 4, 222 (interpreting the "anti-discrimination" provisions of the Act). Indeed, as recognized by both Third Circuit panels, the presence of two communication towers in Easttown's business district at the time of the Petitioner's application defeats any argument concerning the discrimination prong of the TCA at 47 U.S.C. § 332(c)(7)(B)(i)(I). Pet., App. A at 12a-13a; App. B at 49a.

Similarly, the legislative history of the Act indicates that decisions as to "prohibition" are not all or nothing propositions:

> It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed **and that decisions be made on a case-by-case basis.**

H.R. Conf. Rep. 104-458 at 208, reprinted in 1996 U.S.C.C.A.N. at Vol. 4, 222 (emphasis added).

The fact-finders below engaged in a careful analysis of the Petitioner's case well within the parameters of the TCA. The Petitioner is entitled to nothing more, even if it is dissatisfied with the result.

## III.

## PETITIONER'S ASSERTION OF A SPLIT AS TO THE FEDERAL CIRCUITS IS NOT WORTHY OF REVIEW GIVEN THE PETITIONER'S ERRONEOUS "ONE PROVIDER RULE" PREMISE

The Petitioner's erroneous "one provider rule" premise provides its basis for asserting a split with another United States Court of Appeals. As the "one provider" premise is without foundation in the first instance, the Petitioner's discussion of this so-called "one provider rule" fails to show an important, much less any, conflict among the circuits. Further elaboration by the Respondent is therefore unnecessary.

## CONCLUSION

This case does not merit further review by this Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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